SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 318

CONSOLIDATED DISTRIBUTORS, INC.,

vs.

CITY OF ATLANTA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA AND BRIEF IN SUPPORT THEREOF.

GEORGE C. SPENCE,
Counsel for Petitioner.

INDEX.

Subject Index.

Table of Cases.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 318

CONSOLIDATED DISTRIBUTORS, INC.,

vs.

CITY OF ATLANTA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Consolidated Distributors, Inc., respectfully prays that a writ of certiorari issue to review the final judgment of the Supreme Court of the State of Georgia entered in the above cause (R. 22), sustaining a judgment of the Superior Court of Fulton County, Georgia, dismissing petitioner's suit (R. 15).

Statement of Case.

The opinion of the Supreme Court of Georgia (R. 16-22), is reported in 193 Ga. 853.

Jurisdiction.

The judgment of the Supreme Court of Georgia sought to be reviewed was entered April 16, 1942 (R. 22). A motion for rehearing was filed April 28, 1942 (R. 26), and denied May 20, 1942 (R. 26). Notice that application for this writ would be made was filed May 21, 1942 (R. 26).

Jurisdiction of this Court is invoked under *Judicial Code*, Section 237, Title 28, U. S. C., Section 344, as amended.

Statutes Involved.

The *Georgia Constitution*, Article VII, Section 2, paragraph one, provides that "taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed."

The Fourteenth Amendment to the Constitution of the United States prohibits states from denying "to any person within its jurisdiction the equal protection of the laws."

Chapter 26 of the Internal Revenue Code of the United States, Title 26, U. S. C., Sections 2800 to 3181, comprehensively regulates the manufacture, sale and taxation of liquors (See Act, as amended June 25, 1940, 11:45 a. m., E. S. T., c. 419, Title II, Section 213 (a), 54 Stat. 524; Sept. 20, 1941, 12:15 p. m., E. S. T., c. 412, Title V, Section 533 (a) (b) (d), 55 Stat. 708) and Section 2800 fixes a tax on

> "all distilled spirits in bond or produced in or imported into the United States an internal revenue tax at the rate of $4 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn from bond."

This tax (Sec. 2800 (3) (e) (1)) is

> "a first lien on the spirits distilled."

Bonded warehouses under the control of a Federal officer where liquors may be kept in storage are authorized (Sec. 2872), and the leakage of liquors stored therein can be regulated by such officer (Sec. 2880).

An allowance may be "made for leakage for loss by an unavoidable accident." (Section 2889), but when insurance is received "in excess of the market value, exclusive of the tax, upon such spirits," recovery cannot include "such excessive insurance" (Section 2890). Withdrawals from a "general and special bonded warehouse" must be "within eight years from the date of the original entry therein," (Section 2900), and, when withdrawn, a credit allowance may be made for leakage or evaporation (Section 2901).

Summary Statement.

Petitioner, plaintiff in the trial court, sought an injunction against proceedings to collect what it alleged was an illegal tax because its property, certain liquors, were assessed by including taxes required to be paid to the United States.

This petition, to explain the delay in filing the bill, set out proceedings had before the City Tax Officers. These allegations are not here material, because the demurrer on that ground was not sustained by the appellate court (R. 16).

The allegations concerning the validity of the assessment are general, but no special demurrer was urged thereto, and the trial court sustained a general demurrer (R. 15). The allegations of the illegality of the method of assessment, briefly summarized, are "that the agents of the city of Atlanta objected to the valuation placed upon the stock of liquors by petitioner, upon the ground that petitioner had eliminated and deducted from the gross amount of valuation shown upon the inventories, the amount of state

and federal taxes which had either been paid, or were due to be paid when the said liquors were sold" (R. 6).

Petitioner alleged that it claimed to the City authorities that the "amount of taxation necessary for petitioner to pay upon said liquor *whenever it was sold,*" was to be obtained by deducting such taxes from the selling price. It was further alleged that petitioner was required to return all of its personal property for ad valorem taxation at such prices as would include the ultimate taxes (state and federal taxes) that it would be necessary for petitioner to pay when the said liquors were sold (R. 6).

Petitioner offered to value its property "upon the actual cost of the liquors" but this assessment was refused (R. 12). Petitioner tendered the amount due, if what it contended was the true value (R. 6-7, 9, 12).

The prayers for relief included:

> "That the Court shall decree and determine that the true valuation upon petitioner's said stock of liquors, for the purpose of ad valorem taxation for the City of Atlanta, is the actual value of said stock of liquors less the State and Federal taxes which has been or are to be paid upon the same before the said liquors are sold" (R. 9).

The Supreme Court in its original opinion, held that the method of assessment adopted by the city was lawful (R. 16-20) but on rehearing decided that one issue, that as to taxes to be paid, had not been properly raised (R. 20), and rendered its judgment against petitioner.

No special demurrer was filed or decided in the trial court raising the issue that the pleadings in this respect were too indefinite.

The Decision and the Judgment of the Supreme Court of Georgia.

The court below held that excise taxes paid to the United States could be added to the cost or inherent value of liquors, and that as to taxes to be paid, when the liquors should be within eight years, withdrawn from a government controlled warehouse, the issue had not been properly raised.

Questions Presented.

1. May a subordinate agency, the City of Atlanta, of the State of Georgia add the excise tax paid the United States to the cost in assessing liquor for taxation?

2. May a subordinate agency, the City of Atlanta, of the State of Georgia add the amount of the uncollected excise tax on liquors, levied by the United States and held in bond, to the cost in assessing liquor for taxation?

Reasons Relied On for the Allowance of the Writ.

The Supreme Court of Georgia "has decided a federal question of substance not theretofore determined by this court."

There are, so far as petitioner can find, no decisions of this Court directly applicable to the issue decided by the Supreme Court of Georgia, but the decision of that court is probably not in accord with analogous decisions of this Court. (Rules of this Court, 38 (5) (a).)

The public importance of the issues here presented is obvious. If the system of valuing liquors adopted by the City of Atlanta, respondent hereto, be applied generally, liquor could not, without prohibitive expense to the dealer, be stored in a government warehouse. The Federal laws now authorize such storage for a period of as much as eight years. Nor could the policy of the United States to collect

heavy excise taxes in liquors be continued if the States, Counties and municipalities may tax such tax by adding it to the valuation of the liquors.

A supporting brief is annexed hereto citing authorities which support petitioner's contentions.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Georgia should be granted.

GEORGE C. SPENCE,
Counsel for Petitioner.

Citizens and Southern
National Bank Building,
Atlanta, Georgia.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 318

CONSOLIDATED DISTRIBUTORS, INC.,

versus

CITY OF ATLANTA.

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

Jurisdiction.

Jurisdiction of this Court is invoked under *Title 28, Section 344 (b) U. S. C., Section 235 Judicial Code.*

The petition to which this is attached states special reasons why it should be granted.

Specifications of Error.

1.

The Supreme Court of Georgia erred in deciding that the City of Atlanta, a subdivision of the State of Georgia, could add the excise tax paid the United States under a federal law, to the cost of liquor in assessing such liquor for taxation.

2.

The Supreme Court of Georgia erred in adjudging that the City of Atlanta, a subdivision of the State of Georgia, could add the amount of the uncollected excise tax on liquors, levied under a federal law by the United States, but held in bond and the tax uncollected, in assessing liquor for taxation.

Applicable Law.

First Assignment.

The first assignment of error above involves a situation where petitioner, in order to be authorized to sell its liquors, had paid the excise tax required by *Title 26, U. S. C., Internal Revenue Code, Chapter 26;* and where the City added the amount of such tax to the cost of the liquors as a value to which the tax rate of the city was applied.

The Supreme Court of Georgia, at page 857 of its opinion herein, relied on two cases decided by the Supreme Court of North Carolina. These decisions are not binding even if they fit the facts here. In the latest of these cases, which is more nearly in point, it was argued as stated in the opinion, that "the price paid to the distiller by the plaintiff (taxpayer) was $1.25 per gallon," and the court held that that purchase price was the sum to which the state tax was to be applied, although the distiller, before he had sold to the purchaser, "had paid the government tax of $1.10." The Court, answering the argument that the $1.25 included the tax of $1.10 paid by the distiller before the sale, said: "But the tax paid was the purchase price and it is immaterial to the purchaser * * * how much (was) for tax." There the seller paid the tax before the purchaser bought the liquors, here the purchaser paid the tax after the purchase; and the Supreme Court of Georgia, in headnote 2, page 853, in holding that the amount of the tax must be included in the assessed value, however paid, said:

> "Where * * * such taxes are paid by a wholesale dealer, either by his direct payment to the Government under arrangement with the manufacturer or by his payment to the manufacturer of an increased purchase-price, the amounts of these taxes constitute an element in the cost and value of the liquors so purchased by the dealer. Therefore a city may lawfully include these amounts in assessing the value of the liquors for ad valorem taxation; and such an inclusion is not a tax on Federal excise taxes."

The Georgia court, in its opinion herein, relied on *Lash's Products Co.* v. *U. S.*, 278 U. S. 175, 176 (49 Sup. Ct. 100, 73 L. Ed. 251); and other cases from lower federal courts and one state court (p. 857). These cases are inapplicable to the issue here. In the *Lash* case, the dealer added the tax to the selling price and the tax under the statute was 10 per centum of "the price for which so sold."

It is not here contended that the liquor could not be taxed "upon the value of said property," *(Ga. Code 92-4101)*, as other personal property. We do contend that the tax, whether advanced or to be advanced, could not be added to the inherent value of the property. If the tax had been based on an assessment at the inherent value of the liquor, it would have been legal. *Carstairs* v. *Cochran*, 193 U. S. 10, 16, 17.

"Cost of Production" was considered as a basis of a sale or pledge of liquor by warehouse certificate in a bonded warehouse in *Taney* v. *Penn. Nat'l Bank*, 232 U. S. 177, 185. In that case the limited right or title is stated (p. 185), and while that case is not definitely determinative of the issue here, it tends to support petitioner's contention. Indeed it can be said that the Supreme Court of Georgia "has decided a federal question of substance not theretofore determined by this court."

An important case not referred to by the lower court throws light upon this subject. In *Thompson* v. *Common-*

wealth of Kentucky, 209 U. S. 340, there was for consideration a statute of the State of Kentucky (sec. copied at page 345 of the opinion), which authorized taxes on distilled spirits while in a bonded warehouse. This statute, however, made the taxes due following the payment of the Government tax and the resulting right to remove. As the government tax had not been paid, it follows that the Kentucky tax was levied only on the value of the distilled spirits. It was contended there by the plaintiff in error that the state could not tax the property at all or at any value. The Kentucky court held that it was not the purpose of the state

> "to collect the taxes so long as the spirits are in the custody or under the lien of the Federal Government."

Because of this holding, which is directly in conflict with the holding of the Georgia Supreme Court in the instant case, this court affirmed the right to tax. Because of the reservations in the *Kentucky* case, we submit that it is authority against the holding of the state court in this case.

In *Hannis Distilling Company* v. *Baltimore,* 216 U. S. 285, at page 292, the case of *Thompson* v. *Kentucky,* above, was followed. The whole tenor of this second case, as of the first, was to show that the tax had not been included in the valuation. *In re Miller Distilling Company,* 176 Fed. 606, affirmed 232 U. S. 174, the person in the situation of the taxpayer here was held to be a bailee and not an owner.

In 21 *Op. Atty. Gen.* 73, the Attorney General ruled that the dispensary law of South Carolina was ineffective and inoperative as against distilled liquors held in the United States bonded warehouse. This opinion is but corroborative of our argument herein that the taxpayer here had until the tax was levied no right to possess the property and only an interest therein.

Second Assignment.

This assignment differs from the first. There the tax had been paid, here it had not.

If the first issue on which this petition is grounded shows error in the court below, error exists as to the second issue. The first issue might be held free from error, and error exists in the second. The first required adding to the value a tax already paid, the second required adding to value a tax that was to be paid, with deduction for losses, in eight years.

A dealer who buys liquors can not re-sell them until the tax is paid. His is a qualified interest in liquor and he should be taxed only on the value of that interest.

By an elaborate system of regulation, the United States receives large amounts in excise taxes as payment for permitting the manufacture and sale of liquors. If the amount charged for this permission, paid or unpaid, must be added to taxable value, the government's regulatory and taxation laws are affected. If a distiller buys liquor at $2.00 a gallon and is taxed for that amount plus a four dollar tax, and keeps his liquor in the bonded warehouse for eight years, he has paid on an ad valorem valuation of six dollars per year, or a total valuation of $48.00, $2.00 inherent value, and a tax of $4.00 which is repeated in the assessment for eight years. This actual value added for eight years, a total of $16.00, is added to the tax for this length of time, making a total on which tax was paid of $48.00. That this is a direct interference with federal regulation is apparent. So the Georgia court disregarded a valid federal law.

The ordinary tax payer does not add to the value of his property the tax, whether paid or due, eight years hence, so the judgment of the court below denies petitioner here the equal protection of the laws.

It may be contended that the opinion on rehearing denies

petitioner the right here and now to raise the second question. As shown in the petition, this issue was raised and a decision avoided thereon by the holding that the pleadings did not raise such an issue. It is conceded that had a special demurrer been urged and decided, an amendment to the petition could properly have been required. There was no special demurrer on the issue discussed in the supplemental opinion of the court below. The pleadings summarized in the petition show that there were both paid and unpaid taxes. These facts were before the trial court and the Supreme Court. Perhaps they could have been more elaborately stated, but no demurrer or motion for greater detail was filed to the allegation. In the first opinion the Supreme Court of Georgia made the decision applicable to "direct payment to the government" or "by payment to a manufacturer of an increased price." It is clear that the facts were before the Courts below.

Regardless of the pleadings, the Supreme Court of Georgia has sustained a judgment of the trial court which taxes petitioner at a value reached by adding the government tax paid or to be paid. The taxing statute of Atlanta, as administered by this judgment, is repugnant to laws of the United States and denies a right, privilege and immunity claimed under the Constitution and statutes in pursuance thereof. Petitioner falls within the rule stated in *Vidalia R. Co.* v. *State of Indiana,* 207 U. S. 319, 367, where it was held that this court "is not concluded by the ruling of the state court, and must determine for itself whether there is really involved any federal question," and following this holding the court continued:

> "Newport Light Co. *v.* Newport 151 U. S. 527, 536, 38 L. ed. 259, 262, 14 Sup. Ct. Rep. 429, and cases cited in the opinion. A case may arise in which it is apparent that a Federal question is sought to be avoided or is

avoided by giving an unreasonable construction to pleadings, * * *."

An untenable non-federal basis for a decision does not deprive this Court of jurisdiction. *Ward* v. *Levi Connely*, 253 U. S. 17; *Broadwell* v. *Carter County*, 253 U. S. 251.

"To hold otherwise would open an easy method of avoiding the jurisdiction of this court." *Terre Haute, etc. R. Co.* v. *Indiana*, 194 U. S. 579.

In *Chicago R. Co.* v. *Illinois*, 200 U. S. 561, after stating the general rule, this court said:

"* * * this court will decide the federal question if the necessary effect of the judgment is to deny a federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law."

Respectfully submitted,

GEORGE C. SPENCE,
Counsel for Petitioner.

Citizens and Southern
National Bank Building,
Atlanta, Georgia.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

NO. 318

CONSOLIDATED DISTRIBUTORS, INC.,

versus

CITY OF ATLANTA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

J. C. MURPHY,
Attorney for Respondent

Of Counsel:

J. C. SAVAGE, EDWIN L. STERNE, FRANK A. HOOPER, JR.
Atlanta, Georgia.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

NO. 318

CONSOLIDATED DISTRIBUTORS, INC.,

versus

CITY OF ATLANTA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

This case involves merely the correctness of an assessment by the City of Atlanta for ad valorem taxation of a stock of liquors belonging to petitioner herein. The validity of no statute of the United States was drawn in question, nor was there drawn in question the validity of any state statute on the ground of its being repugnant to the Constitution or statutes of the United States; nor was any title, right, privilege or immunity specially set up or claimed under the Constitution or statutes of the United States. No Federal question was decided by the Supreme Court of Georgia, nor was any Federal question involved either in the pleadings

or in the decision. There is, therefore, no question which is reviewable by this Court in this case. See the following authorities:

Brown vs. Atwell,
92 U. S. 327, 23 L. Ed. 511.

Citizens Bank vs. Board of Liquidation,
98 U. S. 140, 25 L. Ed. 114.

Murdock vs. Memphis,
20 Wall. 590, 87 U. S. 429, 22 L. Ed. 429.

Chouteau vs. Gibson,
4 S. Ct. 304, 111 U. S. 200, 28 L. Ed. 400.

Adams County vs. Burlington & M. R. R. Co.,
5 S. Ct. 77, 112 U. S. 123, 28 L. Ed. 678.

Detroit City Ry. Co. vs. Guthard,
5 S. Ct. 811, 114 U. S. 133, 29 L. Ed. 118.

We, therefore, believe that the petition should be denied.

Respectfully submitted,

J. C. MURPHY,
Attorney for Respondents

Of Counsel:

J. C. SAVAGE, EDWIN L. STERNE, FRANK A. HOOPER, JR.
Atlanta, Georgia.

803 Citizens and Southern National Bank Bldg.,

Atlanta, Georgia.